STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Jansen, P.J., Beckering and O'Brien JJ

SAMANTHA LICHON,

Plaintiff-Appellee,

v

MICHAEL MORSE, and
MICHAEL J MORSE, P.C.,

Defendants-Appellants.
_____/

SC: 159492
COA: 339972
Oakland County CC: 17-158919-CZ

JORDAN SMITS,

Plaintiff-Appellee,

v

MICHAEL MORSE, and
MICHAEL J MORSE, P.C.,

Defendants-Appellants.
_____/

SC: 159493
COA: 341082, 340513
Wayne County CC: 17-008068-CZ

DEFENDANTS-APPELLANTS MICHAEL MORSE AND MICHAEL J MORSE, P.C.'S BRIEF ON APPEAL

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STATEMENT OF JURISDICTION

Plaintiff Samantha Lichon sued Defendants Michael Morse and Michael J Morse, P.C. ("MJMPC" or the "Firm") in Oakland County Circuit Court. The Oakland County Circuit Court granted Morse and MJMPC's motion for summary disposition and compelled arbitration of Lichon's claims. Lichon appealed.

Plaintiff Jordan Smits sued Morse and MJMPC in Wayne County Circuit Court. The Wayne County Circuit Court granted Morse and MJMPC's motion for summary disposition and compelled arbitration of Smits's claims. Smits appealed.

The Court of Appeals consolidated Lichon's and Smits's appeals (Docket Nos. 339972, 340513, and 341082). In a March 14, 2019, published opinion, the Court of Appeals reversed the circuit courts' orders granting summary disposition in each case. *Lichon v Morse*, 327 Mich App 375; 933 NW2d 506 (2019). Morse and the Firm timely applied for leave to appeal to this Court.

This Court granted Morse and the Firm's application for leave to appeal and ordered that the parties include among the issues to be briefed whether the claims set forth in Plaintiffs' complaints are subject to arbitration. *Lichon v Morse*, ___ Mich ___; 932 NW2d 785 (2019). This Court has jurisdiction over these consolidated cases under MCR 7.303(B)(1).

QUESTIONS PRESENTED

1. Whether the claims set forth in Plaintiffs' Complaints are subject to arbitration where the plain language of the parties' Mandatory Dispute Resolution Procedure Agreement requires the arbitration of "any disagreements regarding . . . discrimination or violation of other state or federal labor laws" and "any claim against another employee of the Firm for violation of the Firm's policies, discriminatory conduct or violation of other state or federal employment laws"?

Lichon/Smits would answer:	No.
Morse/MJMPC answer:	Yes.
The circuit courts answered:	Yes.
The Court of Appeals answered:	No.
This Court should answer:	Yes.

2. Should the Court reinstate the circuit courts' orders granting summary disposition and compelling arbitration of Plaintiffs' Complaints when the Court of Appeals erroneously created a new rule that sexual assault claims can never be "related" to employment and therefore parties may never arbitrate those claims?

Lichon/Smits would answer:	No.
Morse/MJMPC answer:	Yes.
The circuit court answered:	Yes.
The Court of Appeals answered:	No.
This Court should answer:	Yes.

3. Should the Court reinstate the circuit courts' order granting summary disposition and compelling arbitration of Smits's Complaint when the Court of Appeals erroneously created a new rule that sexual assault claims can never be "related" to employment and therefore the parties' bargained-for contractual limitations period does not apply to Smits's claims?

Smits would answer:	No.
Morse/MJMPC answer:	Yes.
The circuit court answered:	The circuit court did not address this issue because it dismissed Smits's claims on the basis of her agreement to arbitrate all disputes with Morse and MJMPC.
The Court of Appeals answered:	No.
This Court should answer:	Yes.

I. INTRODUCTION

When Plaintiffs Samantha Lichon and Jordan Smits joined Defendant Michael J Morse P.C. ("MJMPC" or the "Firm") as employees, they agreed to arbitrate all claims alleging discrimination, violation of Firm policies, and violation of state or federal employment or labor laws. Lichon and Smits filed exactly those claims against Defendant Michael Morse and the Firm in separate circuit court cases. Those courts enforced the parties' agreements, dismissed Plaintiffs' complaints, and compelled arbitration. The Court of Appeals reversed the circuit courts and held that Michigan public policy precludes arbitration of workplace sexual assault allegations. The Court of Appeals judgment casts doubt on whether every agreement mandating arbitration of those and similar claims is still valid in Michigan and, if so, under what circumstances. Of course, those arbitration agreements are still valid and the Court should reaffirm that norm here.

MJMPC employed Lichon and Smits. Lichon's performance as a receptionist was consistently poor and she was warned that continued deficiencies would lead to her termination. She profusely apologized and thanked Morse for giving her "limitless opportunities" and for making a difference in her life. Smits, a paralegal, voluntarily resigned and sent a letter to an MJMPC manager espousing her gratitude for everyone at the Firm and emphasizing that it had been a pleasure working there.

Nonetheless, Lichon and Smits filed these suits alleging sexual harassment against Morse and MJMPC, seeking $15 million and $20 million in damages, respectively. They filed their lawsuits in violation of their agreements to arbitrate all issues over application of MJMPC's policies relative to their employment, including discrimination, violation of state or federal employment or labor laws, and conduct proscribed by MJMPC's employment manual. The

circuit courts summarily dismissed Lichon's and Smits's complaints under MCR 2.116(C)(7) and entered orders compelling arbitration.

The Court of Appeals reversed the circuit courts. In a published opinion, it held that, as a first impression matter of public policy, sexual assault is unrelated to employment and therefore sexual assault claims are not arbitrable because, in its eyes, no person should be forced to arbitrate sexual assault claims. The Court of Appeals' disdain for arbitration was clear: it ignored Michigan's longstanding policy favoring arbitration; it ignored decades-old precedent upholding the enforceability of arbitration agreements, including in sexual harassment cases; it ignored the plain language of the parties' agreements; and it ignored the governing standards of review for determining whether a matter is subject to arbitration.

In so holding, the Court of Appeals did not heed Michigan jurisprudence and reached an incorrect and unprecedented result. The decision also upended a settled and sensible body of legal doctrine. By holding that Plaintiffs and other parties cannot agree to arbitrate sexual assault claims, the Court of Appeals did not just strip these Defendants of their contractual arbitration rights; it cast doubt on an entire body of law and creates uncertainties that will bedevil every party to an arbitration agreement currently existing in this State. For example:

- Is a mere allegation of sexual assault sufficient to void an otherwise valid and binding arbitration agreement so that a court may override the parties' freedom to contract even where the sexual assault claim is never proven?

- If sexual assault allegations are not arbitrable based on public policy, does that also mean that claims for discrimination or harassment based on age, race, religion, national origin, or disability are not subject to arbitration because those claims reflect the likewise important public policies that such conduct should not exist in the workplace or anywhere else?

- If sexual harassment claims based on unwanted physical conduct are not arbitrable, may parties agree to arbitrate disputes involving unwanted verbal conduct, tasteless text messages, emails, or social media communications?

- Will judges' policy preferences result in future rulings that other types of claims are no longer arbitrable because they too reflect important public policies?

This Court should reverse the Court of Appeals judgment and reinstate the circuit courts' orders compelling arbitration of these cases for at least three reasons:

First, the Court of Appeals erred in ignoring axiomatic principles that govern how courts determine whether a matter is subject to arbitration. For decades, Michigan courts have recognized that if there is an arbitration agreement that "arguably" encompasses the subject matter of the dispute, the parties must arbitrate. The Court of Appeals judgment swerves around the plain language of the parties' arbitration agreements and flouts established precedent that courts should resolve all conflicts about arbitrability in favor of arbitration.

Second, Michigan law favors the freedom to contract and the ability of parties to choose the forum for resolving their disputes. Lichon and Smits agreed when they joined MJMPC to arbitrate claims related to employment, including the claims at issue in these cases. To avoid the parties' agreements, the Court of Appeals employed new and unworkable arbitrability tests that consider "foreseeability" and whether there is a "sufficient nexus" between the arbitration agreement and complained-of conduct. Neither test has a basis in Michigan law. Nor did the Court of Appeals identify a well settled public policy to support its decision.

Third, in Smits's case, the parties agreed to a six-month limitations period for the filing of claims against Morse or the Firm, and Smits filed her lawsuit after that time period expired. Based on its conclusion that sexual assault is unrelated to employment, the Court of Appeals refused to apply the parties' bargained-for limitations period and dismiss Smits's untimely claims. The Court of Appeals thereby invalidated another category of contract provisions based on its desired policy outcome. Again, the Court of Appeals set aside the parties' contractual

rights without a sound basis. Its published analysis will also cause needless confusion over which contractual arbitration provisions remain enforceable.

For these reasons and those more fully explained below, the Court should reverse the Court of Appeals judgment and reinstate the circuit courts' orders granting Morse and MJMPC's motions for summary disposition and compelling arbitration of Lichon's and Smits's claims.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

These consolidated cases arise out of Defendant Michael J Morse, P.C.'s employment of Plaintiffs Samantha Lichon and Jordan Smits. MJMPC is a law firm wholly owned by Defendant Michael Morse. (Nachazel Aff, 5/31/17, ¶ 4, Appx 116a). Morse is an employee of MJMPC. (Nachazel Aff, 7/5/17, ¶ 4, Appx 256a.)

A. The Lichon Case

1. MJMPC terminated Lichon because of her admittedly poor performance

In September 2015, MJMPC hired Lichon as a receptionist. (Nachazel Aff, 5/31/17, ¶ 5, Appx 116a.) Lichon's performance as a receptionist was substandard, and on March 29, 2017, the Firm placed her on "Final Warning Status." In response to being placed on Final Warning Status, Lichon emailed MJMPC's management, in which she not only acknowledged her deficient performance and apologized for her poor behavior, but expressed deep appreciation for her time at MJMPC:

> I just truly wanted to apologize for being disappointing. I thought I could for sure do good. I know I can, just have made to [sic] many inexcusable mistakes. I truly do know that they have been over and over. I wish I could change it all, but the only thing I can do is learn from all of these situations and make myself better at this job. I totally understand all of your frustration and I am sorry I put you all through so much. You guys have given me limitless

[1] The Factual Background and Procedural History is adopted without significant revision from Morse and the Firm's April 25, 2019, Application for Leave to Appeal.

> opportunities and I sincerely will and do always appreciate it as I know I am such a pain. Your support has made such a difference in my life whether it ends up working out or not and I really am grateful. I just feel so grateful for everything you guys as a whole firm has taught me. I just had to make that known. Thank you times a million for really working with me. The appreciation is unexplainable. xoxox

(Lichon Email, 3/29/17, Appx 98a.)

On April 7, 2017, MJMPC terminated Lichon for cause. (Nachazel Aff, 5/31/17, ¶ 7, Appx 117a.) MJMPC provided Lichon a memorandum explaining the reasons for her termination, including her excessive absences and repeated failure to meet performance standards:

> You have been counseled on several occasions regarding your excessive absences, as evidenced by having no remaining PTO for the year in March.
>
> You have been counseled on several occasions regarding your failure to meet performance standards regarding servicing clients in the reception area and directing calls appropriately.
>
> On March 29, 2017 you were placed in Final Warning Status for your poor performance. Because of your inability to meet the performance standards for your position as a Receptionist your employment is terminated effective today, April 7, 2017.

(Lowery-Jater Memorandum to Lichon, 4/7/17, Appx 71a.)

2. Lichon executed the MDRPA and acknowledged her rights and obligations under the Firm's Employee Policy Manual

When the Firm hired Lichon in September 2015, she signed the MDRPA. (MDRPA, p 8, Appx 42a.) As part of the MDRPA, Lichon agreed to arbitrate any claims against MJMPC and other Firm employees for violations of Firm policies, discrimination, or violation of state or federal employment or labor laws:

> This Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment,

> including, but not limited to, ***any disagreements regarding*** discipline, termination, ***discrimination or violation of other state or federal employment or labor laws***. This includes any claim over the denial of hire. ***This Procedure includes any claim against another employee of the Firm for violation of the Firm's policies, discriminatory conduct or violation of other state or federal employment or labor laws***. Similarly, should the firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.
>
> If the Parties are unable to resolve the dispute at the first two steps of the appeal procedure, either Party shall have the right to take the concern to final and binding arbitration before an independent arbitrator selected by the Parties. The arbitrator shall have the same remedies available to resolve the dispute as if the matter were brought in state or federal court or before an administrative agency. ***This Procedure waives the right of the employee and the Firm to have the matter submitted to a court for a jury trial***. The loss of the right to a jury trial is offset by a procedure which is speedy, low in cost and avoids lengthy appeals of the decision of the arbitrator by either side. You can even use this procedure without the necessity of a lawyer thereby avoiding attorney fees. By accepting or continuing employment, ***you understand and agree that you will follow and be bound by the results of this Mandatory Dispute Resolution Procedure***.

(*Id*. at p 1, Appx 35a (emphasis added).)

The MDRPA specifies that "[t]he ***only exceptions*** to the scope of [the MDRPA] shall be for questions that may arise under the Firm's insurance or benefit programs (such as retirement, medical insurance, group life insurance, short-term or long-term disability or other similar programs)" and "to claims for unemployment compensation, workers' compensation or claims protected by the National Labor Relations Act." (*Id*. at pp 1-2, Appx 35a-36a (emphasis added).)

The "Policies and Procedures" to which the MDRPA applies are in the Firm's Employee Policy Manual (the "Manual"). MJPMPC provided a copy of the Manual to Lichon when she executed the MDRPA. The Manual includes an Anti-Discrimination, Harassment, and Retaliation Policy that prohibits all forms of sexual harassment:

Anti-Discrimination, Harassment, and Retaliation Policy

> ***Sexual harassment, whether verbal, written, physical or environmental, is unacceptable and will not be tolerated***. Sexual harassment is defined as unwelcome or unwanted conduct of a sexual nature (verbal, written, physical or environment) when:
>
> 1. Submission to or rejection of this conduct is used as a factor in decisions affecting hiring, evaluation, promotion or other aspects of employment; and/or
>
> 2. Conduct substantially interferes with an individual's employment or creates an intimidating, hostile or offensive work environment.
>
> ***This policy covers all employees***. The Firm will not tolerate, condone or allow any incident of discrimination, harassment or retaliation. The Firm encourages reporting of all such incidents, regardless of who the offender may be . . . .

(Manual, pp 3-4, Appx 52a-53a (emphasis added).) The Manual also includes a Workplace Violence Prevention policy that prohibits sexual harassment and violent acts both at the office and at work-related functions outside the office:

Workplace Violence Prevention

> We are committed to preventing workplace violence and making The Firm a safe place to work. ***This policy explains our guidelines for dealing with intimidation, harassment, violent acts, or threats of violence that might occur on our premises at any time, at work-related functions, or outside work*** if it affects the workplace.
>
> ***
>
> The Firm does not allow behavior in the workplace at any time that threatens, intimidates, bullies, or coerces another employee, a client, or a member of the public. ***We do not permit any act of harassment, including harassment that is based on an individual's sex***, race, religion, age, national origin, height, weight, marital status, disability, sexual orientation, or any characteristic protected by federal, state, or local law . . . .

(*Id*. at p 18, Appx 67a (emphasis added).) Lichon executed the MDRPA and acknowledged her rights and obligations under the Manual. (Agreement for At-Will Employment and Agreement for Resolution of Disputes, pp 1-3, Appx 43a-45a.)

3. In breach of the MDRPA, Lichon filed a complaint in circuit court alleging workplace harassment, among other claims

Despite the MDRPA and its requirement that Lichon submit any claims to arbitration, on May 24, 2017, Lichon filed a complaint against Morse and MJMPC in Oakland County Circuit Court (Docket No. 2017-158919-CZ). Two days later, Lichon filed an Amended Complaint. Lichon's complaint alleged claims for workplace sexual harassment—violation of the Elliott-Larsen Civil Rights Act [MCL 37.2101 *et seq*.] ("ELCRA") against MJMPC and Morse (Count I); sexual assault and battery against Morse (Count II); negligent and intentional infliction of emotional distress against Morse (Count III); negligence, gross negligence, and wanton and willful misconduct against MJMPC and Morse (Count IV); and civil conspiracy against MJMPC and Morse (Count V). (*Lichon* First Am Compl, 5/26/17, Appx 72a-95a.) Her complaint alleges that Morse "made inappropriate comments of an offensive nature," and "on multiple occasions . . . actually and physically touched" her. (*Id*., ¶¶ 15-16, Appx 74a.) The ELCRA and sexual assault and battery claims are based on the same alleged acts. Lichon's complaint detailed that all of her claims and each of her counts arise from her employment and the conduct governed by the Manual.

4. The circuit court dismissed Lichon's complaint and compelled arbitration

Rather than file answers, on May 30, 2017, Morse and MJMPC moved to dismiss under MCR 2.116(C)(7) because the MRDPA requires arbitration of Lichon's claims.

The circuit court agreed with Morse and MJMPC, dismissed Lichon's complaint, and compelled arbitration based on the MDRPA. The circuit court opined that Lichon's ELCRA

claim and her assault and battery claim were "inextricably intertwined" and governed by the MDRPA:

> I find that this is a valid and enforceable arbitration agreement. I find that all of [P]laintiff's claims are inextricably intertwined and therefore all fall within the arbitration agreement and the workplace policies. I also find that Michael Morse named individually is also bound by the terms of the arbitration agreement as her employer of Michael Morse, P.C., and I'm sending all of the claims to arbitration granting defendant's SD motion.

(June 21, 2017, Hr'g Tr on Defs' Mot for Summ Disp, p 33, Appx 184a.) On August 18, 2017, the court denied Lichon's motion for reconsideration. (Order, Appx 200a-201a.)

Lichon's appeal ensued.

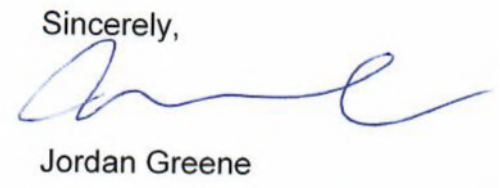
B. The *Smits I* Case

1. Smits voluntarily resigned and thanked the Firm for her employment

On February 17, 2014, MJMPC hired Smits[2] as a file manager. (Nachazel Aff, 6/2/17, ¶ 5, Appx 126a.) Smits later resigned from her position by letter to Perry Schneider, MJMPC's Operations Manager:

> Dear Perry,
>
> Please accept this letter as notice of my resignation from my position as file manager. My last day of employment will be February 26, 2016.
>
> It has been a pleasure working with you and everyone here at The Mike Morse Law Firm over the last two years. I am so happy I had the opportunity to work for such an incredible law firm. I am very thankful for everything I have learn [sic].
>
> Perry, thank you for the opportunity you gave me to work here. I wish you and the file manager crew the best.

[2] Smits' legal name was Jordan Greene when she joined the Firm and later resigned. Smits later changed her name to Jordan Smits.



(Smits (Greene) Resignation Letter to Schneider, 2/11/16, Appx 46a.)

2. Smits executed the MDRPA and acknowledged her rights and obligations under the Manual

Like Lichon, Smits executed the same MDRPA. (MDRPA, p 8, Appx 33a.) Smits acknowledged receipt of the Manual. (Acknowledgment of MDRPA, 2/17/14; Acknowledgment of Manual, 2/20/14, Appx 33a, 34a.) By doing so, Smits agreed in the MDRPA to arbitrate any claims against MJMPC and other Firm employees for violations of Firm policies, discrimination, or violation of state or federal employment or labor laws.

Along with the provisions cited above, the Manual also provides a six-month limitations period for the filing of any claims related to her employment with MJMPC:

> ***I agree that any claim or lawsuit relating to my employment with Michael J. Morse, P.C. must be filed no more than six (6) months after the date of employment action*** that is the subject of the claim or lawsuit unless a shorter period is provided by law. I waive any statute of limitations to the contrary.

(Acknowledgment of Manual, Appx 34a (emphasis added).)

3. In breach of the MDRPA, Smits filed a complaint in circuit court alleging workplace sexual harassment, among other claims

Smits allowed the six-month limitations period to lapse before filing her lawsuit. Even then, Smits did not pursue arbitration as the MDRPA required; instead she filed a complaint on May 30, 2017—more than 15 months after she resigned—in Wayne County Circuit Court (Docket No. 17-008068-CZ). Smits's complaint sought damages for workplace sexual harassment—violation of ELCRA against MJMPC and Morse (Count I); sexual assault and battery against Morse (Count II); negligent and intentional infliction of emotional distress against

MJMPC and Morse (Count III); and negligence, gross negligence, and wanton and willful misconduct against both MJMPC and Morse (Count IV). (*Smits I* Compl, 5/30/17, Appx 96a-115a.) Smits alleges that, at a 2015 Firm Christmas party, Morse "performed an unwelcome sexual advance through physical conduct of a sexual nature." (*Id*. ¶¶40, 42, Appx 102a.) Her ELCRA and sexual assault and battery claims are based on the same alleged acts. As in *Lichon*, all the claims in Smits's complaint arise from her employment with MJMPC and the conduct governed by the Manual.

4. The circuit court dismissed Smits's complaint and compelled arbitration

Rather than file answers, Morse and MJMPC moved to dismiss under MCR 2.116(C)(7) in light of the MDRPA and, in the alternative, because Smits's claims are barred by the Manual's limitations period. (Defs' Mot to Dismiss, 6/2/17 Appx 128-151a.)

On July 18, 2017, the circuit court issued a written opinion and order dismissing Smits's complaint and compelling arbitration. (Order, 7/18/17, Appx 187a-190a.)

Smits's appeal in *Smits I* followed.

C. The *Smits II* Case

Smits did not proceed as-ordered to arbitration in *Smits I*. Rather, on July 25, 2017, she filed a second complaint in Wayne County Circuit Court (Docket No. 2017-011128-CZ) naming only Morse as a defendant (and not MJMPC in an unsuccessful effort to avoid the MDRPA). The *Smits II* complaint was based on the same factual allegations that supported her complaint in *Smits I*, and re-pled three of exactly the same counts against Morse: sexual assault and battery (Count I), negligent and intentional infliction of emotional distress (Count II), and negligence, gross negligence, and wanton and willful misconduct (Count III). (*Smits II* Compl, 7/25/17, Appx 191a-189a.)

On September 1, 2017, Morse moved to dismiss the complaint, arguing that it was barred by the: (1) doctrines of res judicata and collateral estoppel; (2) MDRPA; and (3) the Manual's limitations period.

On October 2, 2017, the circuit court granted Morse's motion and dismissed the complaint because *Smits II* was barred by res judicata, collateral estoppel, and compulsory joinder. (Order Granting Mot for Summ Disp, 10/2/17, Appx 238a-239a.)

Smits's appeal in *Smits II* ensued.

D. The Court of Appeals Issued a Published Opinion Reversing the Circuit Courts' Orders

The Court of Appeals consolidated Lichon's and Smits's (*Smits I* and *Smits II*) appeals. Lichon and Smits argued that the MDRPA applies only to claims that relate to their employment and that because assault by an employer is unrelated to employment, the MDRPA does not apply to claims against Morse and MJMPC.

1. The Court of Appeals held that sexual harassment claims are unrelated to employment and thus not subject to the MDRPA

The Court of Appeals majority agreed with Lichon and Smits and reversed the circuit courts' judgments dismissing Plaintiffs' complaints and compelling arbitration. As the majority had to do to reach its conclusion, it incorrectly reframed the issue before the court as whether harassment is "related to" employment. *Lichon*, 327 Mich App at 390 ("[T]his Court is asked to decide whether the sexual assault and battery of an employee at the hands of a superior is conduct related to employment."). But the issue it should have considered—and that legally resolves these cases under bedrock principles of Michigan law—is whether Lichon's and Smits's claims arguably fall within the scope of the MDRPA.

The majority stated that whether an employer's alleged assault of an employee relates to employment is an issue of first impression in Michigan. *Id.* at 394 n 1. According to the

majority, Lichon's and Smits's allegations showed that the alleged incidents would not have occurred but for their employment with MJMPC. *Id*. at 393. Even so, the majority sweepingly held that ELCRA sexual harassment and companion tort claims do not relate to employment and therefore cannot be arbitrated. Applying that broad and unprecedented standard to these cases, the majority reasoned that there was an insufficient nexus between the MDRPA and the alleged conduct, and that assaults are not a foreseeable consequence of employment. *Id*. Essential to the majority's conclusion was its policy belief that "no individual should be forced to arbitrate his or her claims of sexual assault." *Id*. at 394-95.

The Court of Appeals also rejected Morse and MJMPC's alternative grounds for affirmance in *Smits I* and *Smits II*, holding that Smits's claims are not barred by the Manual's six-month limitations period. The majority reasoned that the Manual does not apply to Smits's case because "Smits's claims against the Morse firm and Morse are not related to her employment as a paralegal at the Morse firm." *Id*. at 399-400.

2. Judge O'Brien dissented and would have held that Lichon's and Smits's claims are subject to arbitration under the MDRPA

Judge O'Brien dissented. She opined that the issue presented was not one of public policy; rather, "[t]he only issue is whether the claims to be arbitrated—which include claims that plaintiffs were sexually assaulted by their superior—are arguably within the scope of the parties' arbitration agreement." *Id*. at 402-03 (O'BRIEN, J., dissenting). Through this lens, Judge O'Brien would have held that Lichon and Smits agreed to arbitrate "any claim against another employee for discriminatory conduct" and, given that agreement, that the circuit courts properly dismissed their claims and compelled arbitration. *Id*. at 400.

E. This Court Granted Morse and MJMPC's Application for Leave to Appeal

On April 25, 2019, Morse and MJMPC filed their Application for Leave to Appeal to this Court. On September 18, 2019, the Court granted their application and ordered that the parties include among the issues to be briefed whether the claims set forth in Plaintiffs' complaints are subject to arbitration. *Lichon v Morse*, ___ Mich ___; 932 NW2d 785 (2019).

III. STANDARD OF REVIEW

The Court reviews de novo a trial court's decision on a motion for summary disposition. *Altobelli v Hartmann*, 499 Mich 284, 294–95, 884 NW2d 537 (2016). In conducting its analysis, the Court reviews the entire record to determine whether summary disposition is appropriate. *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 289 (1996). Under MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of "an agreement to arbitrate[.]" The Court reviews de novo whether a particular issue is subject to arbitration. *Altobelli*, 499 Mich at 295. So too is the interpretation of contractual language. *Id.*, citing *Morley v Auto Club of Mich*, 458 Mich 459, 465; 581 NW2d 237 (1998).

MCR 2.116(C)(7) permits summary disposition where "judgment, dismissal of the action, or other relief is appropriate because of . . . [a] statute of limitations." The Court reviews that determination de novo. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010).

IV. SUMMARY OF ARGUMENT

The Court of Appeals reversibly erred in two respects. First, in *Lichon* and *Smits I*, it ignored the MDRPA and held that, as a first impression matter of public policy, courts may thwart parties' contractual intent to arbitrate claims—and thereby avoid application of an otherwise valid agreement—because sexual assault claims are unrelated to employment and should not be subject to arbitration. That is not the law in Michigan and the published Court of Appeals opinion not only discards longstanding precedent enforcing arbitration agreements in

employment and harassment cases, but clouds the enforceability and scope of nearly every existing arbitration agreement and countless ongoing arbitrations throughout the state.

Second, in *Smits II*, the Court of Appeals applied its new rule that sexual assault claims cannot be "related to" employment and held that the parties' bargained-for limitations period does not require dismissal of Smits's untimely claims. As with the first issue, the Court of Appeals' reasoning has no basis in Michigan law.

Each error constitutes an independent basis on which the Court should reverse the Court of Appeals judgment.

V. ARGUMENT

A. The Law Strongly Favors the Arbitrability of the Claims at Issue in these Cases

1. Michigan law strongly favors the arbitration of disputes

The Uniform Arbitration Act ("UAA"), MCL 691.1681 *et seq*., governs arbitration in Michigan.[3] Generally, any dispute that the parties have agreed to arbitrate is arbitrable. See *Amtower v William C Roney & Co*, 232 Mich App 226, 234; 590 NW2d 580 (1998) ("the basic objective in this area is . . . to ensure that . . . arbitration agreements, like other contracts, are enforced according to their terms.") (internal quotation marks and citation omitted). The only exception to the UAA is for collectively bargained arbitration agreements. MCL 691.1683(2).[4]

For decades, the general policy of the State of Michigan has favored arbitration. *Detroit v A W Kutsche & Co*, 309 Mich 700, 703; 16 NW2d 128 (1944). Arbitration is a matter of

[3] The Uniform Arbitration Act superseded the Michigan Arbitration Act, MCL 600.5001 *et seq*.

[4] Although collectively bargained labor issues are not subject to the UAA, Michigan courts cite labor arbitration decisions as precedential in nonlabor arbitration cases. See, e.g., *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991); *Arrow Overall Supply Co v Peloquin Enterprises*, 414 Mich 95, 98; 323 NW2d 1 (1982).

contract. *Altobelli*, 499 Mich at 295. When interpreting an arbitration agreement, the Court applies the same legal principles that govern contract interpretation. *Id*. The primary task is to determine the intent of the parties when they signed the agreement, which is determined by examining the language of the agreement according to its plain and ordinary meaning. *Id*. "Generally speaking, to ascertain whether the subject matter of a dispute is of the type that parties intended to submit to arbitration, we again begin with the plain language of the arbitration clause." *Id*. at 299. "The burden is on the party seeking to avoid the agreement, not the party seeking to enforce the agreement." *Id*. at 295. "The court should resolve all conflicts in favor of arbitration." *Fromm v MEEMIC Ins Co*, 264 Mich App 302, 306; 690 NW2d 528 (2004).

Three factors resolve whether an issue is subject to arbitration: (1) whether there is an arbitration provision in the parties' contract; (2) whether the disputed issue is arguably within the arbitration clause; and (3) whether the dispute is expressly exempt from arbitration under the contract. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC.*, 276 Mich App 146, 163; 742 NW2d 409 (2007). See also *Kaleva-Norman-Dickson School Dist No 6, Counties of Manistee, et al. v Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583, 592-93; 227 NW2d 500 (1975) ("In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.").

Michigan courts enforce arbitration agreements covering a variety of claims, including:

- Attorney's fees and interest
- Attorney malpractice
- Breach of contract, negligent performance of a contract, and tortious interference with a contract
- Business torts
- Civil rights claims
- Conversion
- Damages
- Defamation
- Divorce
- Discrimination

- Employment
- False arrest
- Franchise agreement terminations
- Fraud in the inducement of a contract, and misrepresentation
- Indemnification claims
- Intentional infliction of emotional distress
- Malicious prosecution
- Michigan Consumer Protection Act violations
- Michigan Franchise Investment Law violations
- RICO civil violations
- Specific performance
- Staleness of claim
- Wrongful discharge

See Michigan Pleading & Practice (2d ed), Alternative Dispute Resolution, §§ 62C:11, 62C:214 (collecting cases).

If a party does not want a claim to fall within the scope of an arbitration agreement, that claim should be expressly excluded; otherwise, that claim will fall within the arbitration agreement and be arbitrable. *Kaleva*, 393 Mich at 595 ("The rule promulgated by the United States Supreme Court puts the burden on the party who would exclude a matter from a general arbitration clause to do so expressly and explicitly. We adopt that rule."). Moreover, silence in a broad arbitration agreement about a particular subject matter renders that subject matter arbitrable if it bears some connection to the parties' contractual relationship. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).

2. Federal law also strongly favors the arbitration of disputes

The Federal Arbitration Act ("FAA") took effect in 1926, and is a means of enforcing arbitration provisions appearing in a "contract evidencing a transaction involving [interstate] commerce." 9 USC 2. The "involving commerce" standard is liberally applied and extends the FAA's reach to the limits of Congress' Commerce Clause power.[5] *Allied-Bruce Terminix Cos, Inc v Dobson*, 513 US 265, 268; 115 S Ct 834; 130 L Ed 2d 753 (1995). The FAA applies in state and federal courts, and Michigan courts must enforce substantive provisions of the FAA.

[5] MJMPC and its employees engage in interstate commerce and regularly deal with out-of-state parties, insurance companies, and other third-parties.

DeCaminada v Coopers & Lybrand, LLP, 232 Mich App 492, 498; 591 NW2d 364 (1998). The FAA preempts state substantive law which is in significant conflict with it. *Doctor's Associates, Inc v Casarotto*, 517 US 681, 683, 688; 116 S Ct 1652; 134 L Ed 2d 902 (1996); *Scanlon v P & J Enterprises, Inc*, 182 Mich App 347, 350; 451 NW2d 616 (1990).

Under the FAA, courts should resolve any doubts about the scope of arbitrable issues in favor of arbitration. *Moses H Cone Memorial Hosp v Mercury Const Corp*, 460 US 1, 24-25; 103 S Ct 927; 74 L Ed 2d 765 (1983). A broad arbitration clause encompasses statutory claims unless Congress has shown an intention to preclude a waiver of judicial remedies for the rights at issue. *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 628; 105 S Ct 3346; 87 L Ed 2d 444 (1985) (approving a two-part inquiry for statutory claims: "first . . . whether the parties' agreement . . . reached the statutory issues, and then . . . whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims"). The burden is on the party opposing arbitration to show that Congress intended to preclude the waiver of judicial remedies for the statutory rights at issue. *Shearson/American Exp, Inc v McMahon*, 482 US 220; 227; 107 S Ct 2332; 96 L Ed 2d 185 (1987).

Federal courts too enforce arbitration agreements covering a wide array of claims, including:

- Age discrimination
- Construction contracts
- Employment claims
- Equal Credit Opportunity Act
- ERISA
- Franchise contracts
- Fraud in the inducement of a contract
- Insurance coverage
- Pendent state claims even though a federal claim is not arbitrable
- RICO claims
- Residential termite control contracts
- Securities Act of 1933
- Securities Exchange Act of 1934
- Shareholder disputes
- Sherman Antitrust Act
- State wage statute
- Truth in Lending Act

See Michigan Pleading & Practice (2d ed), Alternative Dispute Resolution, § 62C:71 (collecting cases).

Critically, the U.S. Supreme Court held that the FAA applies to agreements to arbitrate claims arising from employment, including claims of statutory discrimination. *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20, 23, 26; 111 S Ct 1647; 114 L Ed 2d 26 (1991).

The U.S. Supreme Court has also recognized that "nothing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate," and that any dispute or recovery which a party does not wish to be within the authority of an arbitrator should be explicitly excluded from an arbitration agreement. See *Mitsubishi Motors*, 473 US at 628.

Against this legal backdrop, Lichon's and Smits's claims are arbitrable, just like every other category of claims.

B. Lichon's and Smits's Claims Are Subject to Arbitration under the MDRPA

The analysis of whether the claims at issue in *Lichon* and *Smits* are arbitrable begins with the principles espoused in *Altobelli* and consideration of the *Royakker* factors: (1) whether there is an arbitration provision in the parties' contract; (2) whether the disputed issue is arguably within the arbitration clause; and (3) whether the dispute is expressly exempt from arbitration under the contract. *Rooyakker*, 276 Mich App at 163. Each factor convincingly weighs in favor of arbitration.

1. The MDRPA contains an arbitration provision

The parties do not dispute that the MDRPA contains an arbitration provision. The MDRPA requires that Lichon and Smits submit all disputes with the Firm or its employees about the application or interpretation of the Firm's policies, discrimination, or violations of other state employment laws, among other things, to arbitration:

> This Mandatory Dispute Resolution Procedure shall apply to all concerns you have over the application or interpretation of the Firm's Policies and Procedures relative to your employment, including, but not limited to, ***any disagreements regarding*** discipline, termination, ***discrimination or violation of other state or federal employment or labor laws***. This includes any claim over the denial of hire. ***This Procedure includes any claim against another employee of the Firm for violation of the Firm's policies, discriminatory conduct or violation of other state or federal employment or labor laws***. Similarly, should the firm have any claims against you arising out of the employment relationship, the Firm also agrees to submit them to final and binding arbitration pursuant to this Procedure.
>
> If the Parties are unable to resolve the dispute at the first two steps of the appeal procedure, either Party shall have the right to take the concern to final and binding arbitration before an independent arbitrator selected by the Parties. The arbitrator shall have the same remedies available to resolve the dispute as if the matter were brought in state or federal court or before an administrative agency. ***This Procedure waives the right of the employee and the Firm to have the matter submitted to a court for a jury trial***. The loss of the right to a jury trial is offset by a procedure which is speedy, low in cost and avoids lengthy appeals of the decision of the arbitrator by either side. You can even use this procedure without the necessity of a lawyer thereby avoiding attorney fees. By accepting or continuing employment, ***you understand and agree that you will follow and be bound by the results of this Mandatory Dispute Resolution Procedure***.

(MDRPA, p 1, Appx 35a (emphasis added).)

The MDRPA satisfies the first *Rooyakker* factor.

2. Lichon's and Smits's claims fall within the scope of the MDRPA

The second question is whether the disputed issues—alleged ELCRA violations and common law torts—arguably fall within the scope of the MDRPA. *Rooyakker*, 276 Mich App at 163. They do.

Both Lichon's and Smits's complaints—and each of the specific counts in them—are replete with allegations that stem from their employment. A brief review of their alleged

statutory and common law violations shows that their claims are at least "arguably" within the scope of the MDRPA:

Lichon's Complaint	
¶	**Employment-Related Allegation**
4	At all relevant times, Defendant, MICHAEL MORSE, was the owner and agent of Defendant, MIKE MORSE LAW FIRM, who was at all times ***acting within the course and scope of his employment***, and as a result, Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the acts of Defendant, MICHAEL MORSE.
5	***At all relevant times, Plaintiff, SAMANTHA LICHON, was an employee of Defendants***, MICHAEL MORSE AND MIKE MORSE LAW FIRM.
11	***At all relevant times, Defendants***, MIKE MORSE LAW FIRM and MICHAEL MORSE, ***employed Plaintiff***, SAMANTHA LICHON, as a receptionist.
13	***Throughout the course of her employment***, Plaintiff, SAMANTHA LICHON, was continuously and periodically sexually harassed by Defendant, MICHAEL MORSE, who was owner and agent of Defendant, MIKE MORSE LAW FIRM.
15	At all relevant times, and on multiple occasions, Defendant, MICHAEL MORSE, made inappropriate comments of an offensive and sexual nature toward Plaintiff, SAMANTHA LICHON, without invitation, permission, or inducement, ***on the premises of Defendant MIKE MORSE LAW FIRM***.
16	At all relevant times, and on multiple occasions, Defendant, MICHAEL MORSE, actually physically touched Plaintiff, SAMANTHA LICHON'**s**, body without invitation, permission, or inducement, ***on the premises of Defendant MIKE MORSE LAW FIRM***.
25	Plaintiff, SAMANTHA LICHON, ***complained to her superiors at Defendant***, MIKE MORSE LAW FIRM, ***and also to the Human Resources Department at Defendant***, MIKE MORSE LAW FIRM, however no action was taken and the sexual assault and sexual harassment continued.
32	Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the actions of Defendant, MICHAEL MORSE, who is owner and agent of MIKE MORSE LAW FIRM, and ***who was at all times acting within the course and scope of his employment***.
33	Defendants, MICHAEL MORSE and MIKE MORSE LAW FIRM, committed ***various acts of sexual harassment at the workplace***, negligence, intentional and negligent infliction of emotional distress, and sexual assault and battery . . . .
Count I Workplace Sexual Harassment Violation of ELCRA	
36	***Plaintiff***, SAMANTHA LICHON, ***was an employee***, and ***Defendants***, MICHAEL MORSE and MIKE MORSE LAW FIRM, ***were her employer, covered by and within the meaning of [ELCRA]***.

Lichon's Complaint	
¶	**Employment-Related Allegation**
40	The behavior of ***Defendant***, MICHAEL MORSE, was a continuous and/or a periodic problem which was pervasive and ***created an intimidating, hostile, offensive, and/or abusive working environment***.
45	The behavior of Defendant, MICHAEL MORSE, ***substantially interfered with Plaintiff, SAMANTHA LICHON's, employment***.
50	At all times relevant hereto, Defendant, MICHAEL MORSE's, sexual relations with female employees of Defendant, MIKE MORSE LAW FIRM, including but not limited to Jami Rooney, created an intimidating, ***hostile, offensive, and/or abusive working environment which was pervasive and substantially interfered with SAMANTHA LICHON's employment***.
Count II Sexual Assault and Battery	
62	Such assault and battery ***by Defendant, MICHAEL MORSE, as owner and agent of Defendant***, MIKE MORSE LAW FIRM, was committed with the knowledge and consent of Defendant, MIKE MORSE LAW FIRM.
66	Plaintiff, SAMANTHA LICHON, made ***internal complaints against Defendant***, MICHAEL MORSE, to Defendant, MIKE MORSE LAW FIRM's, ***Human Resource Department and/or her superiors*** on multiple occasions, and as such Defendant, MIKE MORSE LAW FIRM, had actual and/or constructive knowledge of Defendant, MICHAEL MORSE's, conduct and propensities.
68	At all times relevant, Defendant, ***MIKE MORSE LAW FIRM, failed to take any remedial action*** regarding Plaintiff, SAMANTHA LICHON's, complaints of sexual harassment against Defendant, MICHAEL MORSE, and as such the sexual harassment and sexual assault continued.
Count III Negligent and Intentional Infliction of Emotional Distress	
71	***Defendant, MIKE MORSE LAW FIRM, by and through its owner and agent Defendant, MICHAEL MORSE***, inflicted great emotional distress upon Plaintiff, SAMANTHA LICHON, by way of his intentional and/or negligent facilitation of the aforementioned illegal and improper acts.
78	Plaintiff, SAMANTHA LICHON, made ***internal complaints against Defendant***, MICHAEL MORSE, to Defendant, MIKE MORSE LAW FIRM's, ***Human Resource Department and/or her superiors*** on multiple occasions, and as such Defendant, MIKE MORSE LAW FIRM, had actual and/or constructive knowledge of Defendant, MICHAEL MORSE's, conduct and propensities.
80	Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the actions of ***Defendant, MICHAEL MORSE, who is owner and agent of MIKE MORSE LAW FIRM, and who was at all times acting within the course and scope of his employment***.

Count IV Negligence, Gross Negligence, Wanton and Willful Misconduct	
82	At all times relevant, ***Defendant, MICHAEL MORSE, who is owner and agent of Defendant, MIKE MORSE LAW FIRM, was acting within the scope and course of his employment***, when he committed the previously described acts constituting negligence, gross negligence, and/or willful and wanton misconduct.
88	Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the actions of ***Defendant, MICHAEL MORSE, who is owner and agent of MIKE MORSE LAW FIRM, and who was at all times acting within the course and scope of his employment***.

(*Lichon* First Am Compl, ¶¶ 4, 5, 11, 13, 15, 16, 25, 32, 33, 36, 40, 45, 50, 62, 66, 68, 71, 78, 80, 82, 88, Appx 73a-92a (emphasis added).)

Smits's allegations are nearly identical to Lichon's:

Smits's Complaint	
¶	**Employment-Related Allegation**
4	At all relevant times, Defendant, MICHAEL MORSE, was the owner and agent of Defendant, MIKE MORSE LAW FIRM, who was at all times ***acting within the course and scope of his employment***, and as a result, Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the acts of Defendant, MICHAEL MORSE.
5	At all relevant times, ***Plaintiff, JORDAN SMITS, was an employee of Defendants***, MICHAEL MORSE AND MIKE MORSE LAW FIRM.
11	At all relevant times, ***Defendants***, MIKE MORSE LAW FIRM and MICHAEL MORSE, ***employed Plaintiff***, JORDAN SMITS, as a paralegal.
13	***During her employment***, Plaintiff, JORDAN SMITS, was sexually harassed by Defendant, MICHAEL MORSE, who was owner and agent of Defendant, MIKE MORSE LAW FIRM.
26	***Plaintiff, JORDAN SMITS, complained to attorney C.F. at Defendant***, MIKE MORSE LAW FIRM, ***and also to the Human Resources Department at Defendant***, MIKE MORSE LAW FIRM, however no action was taken.
35	Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the actions of Defendant, MICHAEL MORSE, who is owner and agent of MIKE MORSE LAW FIRM, and ***who was at all times acting within the course and scope of his employment***.
36	Defendants, MICHAEL MORSE and MIKE MORSE LAW FIRM, committed ***various acts of sexual harassment at the workplace***, negligence, intentional and negligent infliction of emotional distress, and sexual assault and battery . . . .

Count I Workplace Sexual Harassment Violation of ELCRA	
39	***Plaintiff***, JORDAN SMITS, ***was an employee, and Defendants***, MICHAEL MORSE and MIKE MORSE LAW FIRM, ***were her employer, covered by and within the meaning of [ELCRA]***.
40	***At the firm Christmas party***, Plaintiff, JORDAN SMITS, was subjected to unwelcome sexual conduct by Defendant, MICHAEL MORSE, who is owner and agent of Defendant, MIKE MORSE LAW FIRM.
41	***The relevant incident occurred at a company event held specifically and exclusively for employees*** of Defendant, MIKE MORSE LAW FIRM.
49	***The actions of Defendant, MIKE MORSE LAW FIRM, by and through its owner and agent, Defendant, MICHAEL MORSE***, in sexually harassing Plaintiff, JORDAN SMITS, constitutes sexual discrimination in ***violation of [ELCRA]***.
Count II Sexual Assault and Battery	
52	***At the firm Christmas party***, Defendant, MICHAEL MORSE, unlawfully and without consent actually and physically touched Plaintiff, JORDAN SMITS, body, specifically, when he groped her breasts in a sexual manner.
53	***At the firm Christmas party***, Defendant, MICHAEL MORSE, negligently, intentionally, and/or willfully or maliciously sexually assaulted Plaintiff, JORDAN SMITS.
57	Such assault and battery by Defendant, MICHAEL MORSE, as owner and agent of Defendant, MIKE MORSE LAW FIRM, was ***committed at a company event***, in front of employees.
64	Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the actions of Defendant, MICHAEL MORSE, who is owner and agent of MIKE MORSE LAW FIRM, and ***who was at all times acting within the course and scope of his employment***.
Count III Negligent and Intentional Infliction of Emotional Distress	
73	Plaintiff, JORDAN SMITS, made ***internal complaints*** against Defendant, MICHAEL MORSE, to Defendant, MIKE MORSE LAW FIRM's, ***Human Resource Department and/or her superiors***, and as such had actual and/or constructive knowledge of Defendant, MICHAEL MORSE's, conduct and propensities.
75	Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the actions of Defendant, MICHAEL MORSE, who is owner and agent of MIKE MORSE LAW FIRM, and ***who was at all times acting within the course and scope of his employment***.
Count IV Negligence, Gross Negligence, Wanton and Willful Misconduct	
77	At all times relevant, ***Defendant, MICHAEL MORSE, who is owner and agent of Defendant, MIKE MORSE LAW FIRM, was acting within the scope and course of his employment***, when he committed the previously described acts constituting negligence, gross negligence, and/or willful and wanton misconduct.

83	Defendant, MIKE MORSE LAW FIRM, is vicariously liable for the actions of Defendant, MICHAEL MORSE, who is owner and agent of MIKE MORSE LAW FIRM, and ***who was at all times acting within the course and scope of his employment***.

(*Smits I* Compl, ¶¶ 4, 5, 11, 13, 26, 35, 36, 39, 40, 41, 49, 52, 53, 57, 64, 73, 75, 77, 83, Appx 97a-113a (emphasis added).)

It cannot reasonably be disputed that the allegations in Lichon's and Smits's complaints "arguably" fall within the scope of the MDRPA. *Rooyakker*, 276 Mich App at 163. The complaints and each of the counts alleged are based on Lichon's and Smits's claims of workplace harassment, violations of state law (ELCRA), and related common law torts. Each of these claims falls within the scope of the MDRPA and is conduct governed by the Manual.

These are not cases in which only one or two allegations could be interpreted as falling within the scope of the MDRPA. Rather, ***every*** count in each complaint ***specifically alleges*** an employment-related activity and that Morse was acting within the scope of his employment relationship to Plaintiffs. Lichon and Smits were the masters of their complaints. See *Trowell v Providence Hosp and Medical Centers, Inc*, 502 Mich 509, 540 n 51; 918 NW2d 645 (2018) (VIVIANO, J., concurring in result only), citing *Alexander v Electronic Data Sys Corp*, 13 F3d 940, 943-44 (CA 6, 1994) (under the well-pleaded complaint rule, "the plaintiff is the master of his complaint"). They chose to plead employment-related claims. Their complaints should be taken at face value and all of their claims fall within the scope of the MDRPA. And to the extent there remains any doubt about the arbitrability of their claims, the Court should resolve that doubt in favor of arbitration. *Fromm*, 264 Mich App at 306.

3. Neither Lichon's nor Smits's claims are exempt from the MDRPA

The final *Rooyakker* factor is whether the claims at issue are exempt from arbitration. *Rooyakker*, 276 Mich App at 163. Here, the MDRPA does not exempt Lichon's or Smits's

claims from arbitration. To be sure, the MDRPA excepts from arbitration only insurance or benefit programs-related claims, unemployment, workers' compensation, or claims protected by the National Labor Relations Act; those exceptions do not include any of the claims Lichon or Smits pled here:

> The ***only exceptions to the scope of this Mandatory Dispute Resolution Procedure shall be for questions that may arise under the Firm's insurance or benefit programs*** (such as retirement, medical insurance, group life insurance, short-term or long-term disability or other similar programs). These programs are administered separately and may contain their own separate appeal procedures. In addition, ***this Procedure does not apply to claims for unemployment compensation, workers' compensation or claims protected by the National Labor Relations Act***. While this Procedure does not prohibit the right of an employee to file a charge with the Equal Opportunity Commission ("EEOC") or a state civil rights agency, ***it would apply to any claims for damages you might claim under federal or state civil rights laws***. In addition, either Party shall have the right to seek equitable relief in a court of law pending the outcome of the arbitration hearing.

(MDRPA, pp 1-2, Appx 35a-36a (emphasis added).) What's more, even the paragraph detailing the exceptions to the MDRPA reiterates that the agreement explicitly encompass claims for damages brought under state civil rights laws. Both Lichon and Smits seek relief under ELCRA. Neither of their claims are exempt from arbitration.

For these reasons, the circuit courts properly dismissed Lichon's and Smits's claims under MCR 2.116(C)(7) and issued orders compelling arbitration. The Court of Appeals judgment to the contrary ignored the plain language of the MDRPA and the parties' express contractual intent to arbitrate Plaintiffs' claims.

C. The Court of Appeals Erroneously Vacated the Circuit Courts' Orders Compelling Arbitration of Lichon's and Smits's Claims

The Court of Appeals failed to faithfully apply the plain language of the MDRPA and decades of precedent recognizing the broad enforceability of arbitration agreements in arriving at

its admittedly preferred conclusion. In doing so, the Court of Appeals created a new class of arbitration-proof claims that, until now, have routinely been arbitrable.

1. The MDRPA expressly encompasses harassment claims

Even if Lichon's and Smits's claims did not "arguably" fall within the scope of the MDRPA because, as the Court of Appeals held, they are unrelated to employment, the claims are expressly covered by the topics listed in the MDRPA and Manual and, as such, are subject to arbitration.

a. ELCRA claims include physical sexual assault claims

The MDRPA requires arbitration of "any claim against another employee of the Firm for violation of the Firm's Policies, ***discriminatory conduct or violation of other state or federal employment or labor laws***." (*Id*., p 1, Appx 35a (emphasis added).) Analysis of whether the MDRPA applies to Lichon's and Smits's claims should have started and ended "with the plain language of the arbitration clause." *Altobelli*, 499 Mich at 299-300. As discussed above, Lichon and Smits filed claims against Morse and MJMPC for harassment and violations of the policies set forth in the Manual. The MDRPA requires arbitration of those claims. The MDRPA also requires arbitration of ELCRA claims—claims brought under state employment law.

Lichon and Smits each pled in Count I of their complaints that Morse and MJMPC violated ELCRA. (Lichon First Am Compl, pp 7-10, Appx 78a-81a; Smits I Compl, pp 7-9, Appx 102a-104a.) ELCRA prohibits broad categories of undesirable workplace conduct, including discrimination: "An employer shall not . . . discriminate against an individual with respect to employment . . . because of . . . sex . . . ." MCL 37.2202(1)(a). ELCRA broadly defines "discrimination" to include physical sexual harassment:

> ***Discrimination because of sex includes sexual harassment.*** Sexual harassment means unwelcome sexual advances, requests

> for sexual favors, and other verbal or ***physical conduct*** or communication of a sexual nature under the following conditions:
>
> > (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
> >
> > (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.
> >
> > (iii) ***The conduct or communication has the purpose or effect of substantially interfering with an individual's employment***, public accommodations or public services, education, or housing, ***or creating an intimidating, hostile, or offensive employment***, public accommodations, public services, educational, or housing environment.

MCL 37.2103(i) (emphasis added). Michigan courts recognize that sexual assault is a form of sexual harassment that can support an ELCRA claim. See, e.g., *Radtke v Everett*, 442 Mich 368, 379-80; 501 NW2d 155 (1993) ("In pursuit of equality in the workplace, [ELCRA] broadly defines sexual discrimination to include sexual harassment."). See also *Champion v Nationwide Sec, Inc*, 450 Mich 702, 709–10; 545 NW2d 596 (1996) (recognizing that an employer's rape of an employee constitutes discrimination under ELCRA), overruled on other grounds by *Hamed v Wayne Cty*, 490 Mich 1; 803 NW2d 237 (2011). As Judge O'Brien noted in her dissenting opinion, "sexual harassment is, under the ELCRA, discrimination because of sex." *Lichon*, 327 Mich App at 405 (O'BRIEN, J., dissenting).

The Court of Appeals' holding that "sexual assault cannot be related to employment," *id*. at 393, ignores the fundamental premise of ELCRA and its goal of statutorily protecting against the very types of workplace harassment claims that Lichon and Smits pled. In fact, the Court of Appeals did not once mention ELCRA and its impact on these cases in its 13-page opinion. Yet the Court of Appeals recognized that the "clear . . . gravamen of plaintiffs' complaints is that

while working at the Morse firm, they were sexually assaulted and/or harassed by Morse as an individual either during work hours or at work-sponsored events." *Id*. That is alleged workplace harassment. The Court of Appeals ignored the reality of what Plaintiffs pled: claims that Morse and MJMPC violated ELCRA—a statute prohibiting workplace harassment. The Court of Appeals also ignored *Radtke* when it suggested that it was considering for the first time whether sexual harassment claims can be "related to" employment. *Radtke*, citing ELCRA, already recognized that such claims relate to employment: "An employer shall not . . . discriminate against an individual . . . because of . . . sex . . . ." *Radtke*, 442 Mich at 379, citing MCL 37.2202(1)(a).

b. The MDRPA governs Lichon's and Smits's claims because their complaints allege misconduct proscribed by the Manual

In addition to falling under the MDRPA's express language mandating arbitration, Lichon's and Smits's claims are also subject to arbitration because their complaints allege violations of the Manual. The MDRPA requires arbitration of "all concerns you have over the application or interpretation of the Firm's Policies and Procedure relative to your employment, including, but not limited to, any disagreements regarding discipline, termination, discrimination or violation of other state or federal employment or labor laws." (MDRPA, p 1, Appx 35a.)

As described above, the Manual includes an Anti-Discrimination, Harassment, and Retaliation Policy that prohibits sexual harassment. That policy defines "sexual harassment" as "unwelcome or unwanted conduct of a sexual nature (verbal, written, ***physical***, or environment)." (Manual, p 3, Appx 52a (emphasis added).) The Manual also includes a Workplace Violence Prevention policy that prohibits "intimidation, harassment, violent acts, or threats of violence that might occur on [Firm] premises at any time, at work-related functions, or outside work if it affects the workplace." (*Id.*, p 18, Appx 67a.) Because Lichon and Smits alleged unwanted

sexual harassment, intimidation, alleged violent acts, and similar conduct that the Manual prohibits, their claims are subject to arbitration.

Rather than apply the MDRPA and Manual as written, the Court of Appeals detoured into whether it believed Morse and MJMPC followed the Firm's dispute resolution procedures: "[W]e remain incredulous that these policies are stringently followed. In particular, given the nature of plaintiffs' claims, we question the sincerity of the firm policies as articulated by Morse, the sole shareholder of the Morse firm." *Lichon*, 327 Mich App at 396 n 2.

This analysis is flawed on at least three fronts. First, it amounts to improper judicial fact-finding that is unsupported by anything in the record.[6] Second, it improperly impugns the culture of MJMPC with no supporting evidence. Third, it is divorced from the legal issue before the Court of Appeals—whether Plaintiffs' claims are subject to arbitration. Even assuming for the sake argument that the Firm did not follow the Manual (of which there is no evidence), a failure to follow the Manual would not obliterate the bargained-for forum in which Lichon's or Smits's claims would be tried. And whether Plaintiffs should prevail against Morse or MJMPC would of course require an arbitrator to rule on the merits of their claims in their favor. *Lebenbom v UBS Financial Services, Inc*, 326 Mich App 200, 211; 926 NW2d 865 (2018) ("when deciphering whether plaintiff's claims are covered by the parties' arbitration clause, this Court is not permitted to analyze 'the substantive merits' of plaintiff's claims. Rather, if the dispute is subject to arbitration, such matters are left to the arbitrator to decide."), citing *Altobelli*, 499 Mich at 295-96.

[6] There is a minimal record, in any event, since the circuit courts adjudicated these cases on Morse and MJMPC's motions for summary disposition under MCR 2.116(C)(7).

In short, Plaintiffs' claims are based on conduct proscribed by the Manual; the MDRPA requires arbitration of disputes over the Manual; and yet the Court of Appeals held those claims non-arbitrable.

2. Michigan has a strong historical policy favoring arbitration

In 2012, the Legislature advanced an unequivocal policy favoring private arbitration when it enacted the UAA, which endorses binding arbitration agreements like the MDRPA:

> An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.

MCL 691.1686(1). The judiciary has enforced the Legislature's expressed policy and upheld arbitration agreements for more than a century, and this Court has recognized that "[a] parol submission to arbitration is good at common law, and is not forbidden by any statute . . . . If [the parties submitted their agreement to a common arbiter], it would be a valid award." *Cady v Walker*, 62 Mich 157, 159; 28 NW 805 (1886). See also *Hoste v Dalton*, 137 Mich 522, 526; 100 NW 750 (1904) (rejecting various arguments against enforcement of arbitration agreements); *A W Kutsche*, 309 Mich at 703 ("If parties desire arbitration, courts should encourage them.").

Judicial support for arbitration agreements is now part of the bedrock of Michigan law, including with respect to workplace harassment like the claims at issue here. For example, in *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118; 596 NW2d 208 (1999), the Court of Appeals considered the validity and enforceability of an agreement to arbitrate an ELCRA employment discrimination claim and alleged violation of the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq*. The Court held that agreements to arbitrate statutory discrimination and harassment claims are valid absent an express statutory prohibition: "We join

the majority of courts and hold that as long as no rights or remedies accorded by the statute are waived, and as long as the procedure is fair, employers may contract with their employees to arbitrate statutory civil rights claims." *Id*. at 122–23, 158. See also *Dick v Dick*, 210 Mich App 576, 588; 534 NW2d 185 (1995) (finding no prohibition against the use of binding arbitration in the highly sensitive area of child custody disputes); *Moss v Dep't of Mental Health*, 159 Mich App 257, 264; 406 NW2d 203 (1987) (arbitration award denying assault pay benefits under a collective bargaining agreement barred the employee's cause of action for such benefits); *Chippewa Valley Schools v Hill*, 62 Mich App 116, 120; 233 NW2d 208 (1975) (confirming an arbitration award regarding employment pregnancy leave).

Courts have steadfastly adhered to these principles, including in the employment harassment context. See, e.g., *Hicks v EPI Printers, Inc*, 267 Mich App 79, 89; 702 NW2d 883 (2005) (enforcing the terms of an employment manual and compelling arbitration of an employee's sexual harassment claim where the manual included an arbitration agreement, including a one-year limitations period in which the employee could file a sexual harassment claim); *Leonard v Art Van Furniture, Inc*, unpublished per curiam opinion of the Court of Appeals, issued June 8, 2004, (Docket Nos. 243139, 243368) (dismissing an employee's complaint for sexual harassment and retaliation under ELCRA and assault and battery and compelling arbitration because of the parties' arbitration agreement) (See Appx 243a-247a); *Beaver v Cosmetic Dermatology & Vein Centers of Downriver, P.C.*, unpublished per curiam opinion of the Court of Appeals, issued August 16, 2005 (Docket No. 253568) (dismissing an employee's tort claim for an offensive touching because of an agreement to arbitrate "any dispute that arises out of or that relates to employment") (See Appx 240a-241a): *Powell v Sparrow Hosp*, unpublished opinion of the U.S. District Court for the Western District of

Michigan, issued July 23, 2010 (Docket No. 1:10-CV-206) (holding that, under Michigan law, an employee's gender discrimination and tort claims were "inextricably intertwined with her prior employment [relationship]" and thus subject to arbitration under the parties' agreement) (See Appx 251a-252a.) As Judge O'Brien recognized in dissent, courts nationwide have held that alleged instances of sexual harassment are subject to arbitration when the parties agree to arbitrate claims related to employment. See *Lichon*, 327 Mich App at 404 n 1 (O'BRIEN, J., dissenting) (collecting cases).

The Court of Appeals in these cases failed to acknowledge, let alone apply, the holdings of these cases. Yet it was bound to adhere to the rules of law set forth in the published opinions under MCR 7.215(C)(2) and MCR 7.215(J)(1).

The U.S. Supreme Court has also been at the forefront of enforcing agreements to arbitrate civil rights claims. In *Gilmer*, the Court considered whether a claim under the Age Discrimination in Employment Act of 1967 is subject to compulsory arbitration under an arbitration agreement. *Gilmer*, 500 US at 23. The Court began its analysis by recognizing the broad array of claims that may be the subject of an arbitration agreement, including those arising under the Sherman Act, the Securities Exchange Act of 1934, the civil provisions of the Racketeer Influenced and Corrupt Organizations Act, and the Securities Act of 1933. *Id*. at 26. The Court found that the plaintiff's age discrimination claim was equally arbitrable: "[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Id*., citing *Mitsubishi*, 473 US at 628. And the Court held that the burden rests on the plaintiff to show that Congress intended to preclude a waiver of a judicial forum for age discrimination claims. *Id*. And lest there remain doubt about arbitrability, the Court reasoned that, "[t]hroughout such an

inquiry, it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id*. (internal quotation marks and citation excluded).

In sum, the Court of Appeals failed to apply longstanding Michigan and U.S. Supreme Court precedent that strongly favors enforcement of parties' arbitration agreements, even when the allegations include ELCRA or other statutory violations and related tort claims.

3. The Court of Appeals overstepped the judiciary's bounds in setting public policy

a. Michigan and Federal Law provide narrow circumstances in which arbitration agreements violate public policy

An arbitration agreement—like any other contract—that violates public policy is unenforceable. See, e.g., *Southland Corp v Keating*, 465 US 1, 20-21; 104 S Ct 852; 79 L Ed 2d 1 (1984) (STEVENS, J., dissenting in part). But under Michigan law, there are narrow circumstances in which courts can employ public policy as a basis to void an otherwise valid arbitration agreement. "The primary basis for challenging an arbitration agreement on the basis of public policy is that it unfairly truncates or denies legal rights or remedies which would be available in the absence of the agreement." Michigan Pleading & Practice (2d ed), Alternative Dispute Resolution, Agreements Violating Public Policy, § 62C:45. "Another basis for challenging an arbitration agreement on public policy grounds is where it confounds Michigan arbitration law, for example, by allow[ing] the parties to use the courts as a resource that will issue advisory opinions to guide the arbitrator through the more difficult portions of the task." See, e.g., *Brucker v McKinlay Transport, Inc*, 454 Mich 8, 17; 557 NW2d 536 (1997) ("All sorts of private conciliation, mediation, and arbitration devices are available. What parties are *not* able to do, however, is reach a private agreement that dictates a role for *public* institutions."). In other words, courts generally void arbitration agreements only when they curtail substantive

rights or are procedurally unfair or inconsistent with the judiciary's limited role in confirming arbitration awards. See *Rembert*, 235 Mich App at 124 ("While our decision [enforcing the arbitration agreement] upholds the principle of freedom of contract and advances the public policy that strongly favors arbitration, it does so subject to two conditions generally accepted in the common law: that the agreement waives no substantive rights, and that the agreement affords fair procedures.").

Federal authority similarly provides that a public policy-based challenge to an arbitration agreement must show that the agreement unfairly denies legal rights and remedies which would be available without the agreement. See *Gilmer*, 500 US at 26 ("we recognized that [b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.") (internal quotation marks omitted). A party to an arbitration agreement may also successfully invoke public policy as a defense to the agreement where the agreement conflicts with another Federal statute or is procedurally unfair. See, e.g., *Stephens v American Intern Ins Co*, 66 F3d 41, 42, 45-46 (CA 2, 1995) (upholding an anti-arbitration provision in a Kentucky statute where a Federal statute preserved that state statute); *Miller v AAACon Auto Transport, Inc*, 434 F Supp 40 (SD Fla, 1977) (arbitration clause unconscionable because it required Florida consumer to arbitrate in New York City).

b. The Court of Appeals ignored the governing standards for invoking public policy

The Court of Appeals did not acknowledge that courts may invoke public policy to override an arbitration agreement only in these limited circumstances, none of which apply here.

The MDRPA does not abridge any rights or remedies available to Lichon or Smits. To the contrary, it provides that "[t]he arbitrator shall have authority to provide you with all rights

and remedies available under federal or state law . . . ." (MDRPA, p 5, Appx 39a.) There is thus no substantive basis to void the MDRPA.

Procedurally, the MDRPA is fair and does not favor one party over the other. The MDRPA provides that arbitrations are subject to the rules of the American Arbitration Association ("AAA"). (MDRPA, p 4, Appx 38a.) AAA rules, like the Michigan Court Rules, permit broad discovery, including depositions, interrogatories, requests for production of documents, and include hearings on contested issues. (AAA Employment Arbitration Rules, pp 14, 19-21, Appx 215a, 220a-222a.) The MDRPA also requires the arbitrator to "issue a written decision with findings of fact and application of law." (MDRPA, p 5, Appx 39a.) Both parties to the MDRPA waive all rights to a civil suit and the right to a jury trial. (*Id.*). And the Firm will bear the fees and expenses of the arbitration if the arbitrator ultimately issues an award in favor of Lichon or Smits, while the parties would equally share the arbitrator's fees if the arbitrator's award is all or in part in favor of the Firm. (*Id.*) In other words, no facial unfairness renders the MDRPA distinct from other routinely enforced arbitration agreements. See *Gilmer*, 500 US at 30-33 (rejecting as misplaced the plaintiff's arguments that his arbitration agreement was unenforceable because (i) arbitration panels are biased, (ii) discovery is more limited in arbitral than judicial proceedings, (iii) arbitrators do not issue written opinions, and (iv) arbitration procedures do not further the purposes of antidiscrimination laws).

c. The Court of Appeals erred in departing from settled legal principles in favor of its preferred public policy

The Court of Appeals based its decision on a concern that arbitration "silences victims" and allows "abusers to quietly settle these claims behind an arbitrator's closed door." *Lichon*, 327 Mich App at 395. The silencing of sexual assault victims is a valid concern, as is the silencing of any group of victims targeted because of their age, race, religion, national origin, or

disability. But arbitration, and especially the arbitration procedures mandated by the MDRPA, do not inherently have any such effect. There is no prohibition against a successful plaintiff publicizing an arbitration victory; in fact, the MDRPA and MCR 3.602(I) set forth the procedures for publicly confirming an arbitration award. There is thus no more incentive or obligation for either party to settle a contested arbitration than to settle a circuit court matter, and the Court of Appeals cited no authority for its assertion that such settlements would result.

As the cornerstone of its opinion, the Court of Appeals declared that Michigan public policy prohibits arbitration of sexual assault claims and that it is "unimaginable" that parties would knowingly and voluntarily agree to arbitrate such claims:

> . . . ***central to our conclusion in this matter is the strong public policy that no individual should be forced to arbitrate his or her claims of sexual assault***. Though we acknowledge that "[t]he general policy of this State is favorable to arbitration[,]" ***the idea that two parties would knowingly and voluntarily agree to arbitrate a dispute over such an egregious and possibly criminal act is unimaginable***. The effect of allowing defendants to enforce the MDRPA under the facts of this case would effectively perpetuate a culture that silences victims of sexual assault and allows abusers to quietly settle these claims behind an arbitrator's closed door. ***Such a result has no place in Michigan law***.

Id. at 394-95 (emphasis added and citations omitted). The Court of Appeals did not root this ruling in any existing and settled public policy.

In *Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002), the Court recognized that public policy "must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges." The Court recognized that state and federal constitutions, statutes, and the common law are the best indicia of the

boundaries of public policy, and that "[a]s a general rule, making social policy is a job for the Legislature, not the courts." *Id*. at 66-67 (internal citation and quotation marks omitted).

The notion that our courts should not drive public policy is especially true in cases involving private contracts. "There is a significant distinction between something being permitted or even encouraged by law and something being required or prohibited by law. To fail to recognize this distinction would accord the judiciary the power to examine the wisdom of private contracts in order to enforce only those contracts it deems prudent." *Id*. at 69-70. "[a]bsent some specific basis for finding them unlawful, courts cannot disregard private contracts . . . to advance a particular social good." *Id*.

Here, the Court of Appeals did not tacitly rely on its preferred policy outcome. Instead, it openly relied on its "central" belief that in its view, "no individual should be forced to arbitrate his or her claims of sexual assault." *Lichon*, 327 Mich App at 394-95. The majority cited two cases in its discussion of why public policy drives the outcome of these cases. The first, *A W Kutsche*, 309 Mich App at 703, undermines the Court of Appeals' conclusion here because it held that "[t]he general policy of this State is favorable to arbitration." The Court of Appeals then cited *Bienenstock & Associates, Inc v Lowry*, 314 Mich App 508, 515; 887 NW2d 237 (2016), for the proposition that courts cannot force parties to arbitrate any dispute unless they have agreed to do so. But that is exactly what Lichon and Smits agreed to do when they executed the MDRPA—submit to arbitration any claims for discrimination, violation of state or federal employment or labor laws, or any conduct covered by the Manual. So not only did the Court of Appeals overstep the judiciary's bounds by declaring Michigan's public policy, but it cited no supporting authority for doing so.

The Court of Appeals judgment also sidesteps *Gilmer* and *Rembert*, in which the U.S. Supreme Court and Michigan Court of Appeals, respectively, held that statutory civil rights claims, like Lichon's and Smits's ELCRA claims here, are arbitrable. See *Gilmer*, 500 US at 23; *Rembert*, 235 Mich App at 123 ("employers may contract with their employees to arbitrate statutory civil rights claims"). The Court of Appeals' conclusion also upends *Rembert* and its recognition that the Legislature has already expressed its preference for arbitration. *Id*. ("our holding furthers the objectives of the Michigan arbitration act [], which is a strong and unequivocal legislative expression of Michigan's proarbitration public policy."). And the Court of Appeals' conclusion that sexual assault claims should be carved out from arbitration proceedings contradicts other express statutory authorization for arbitration of many sensitive issues,[7] as well as the judiciary's recognition that countless common law claims are arbitrable. See Section V.A., *supra*.

4. The Court of Appeals created a novel "foreseeability test"

In refusing to apply the plain language of the MDRPA, the Court of Appeals concocted a new test for determining the arbitrability of employment-related claims: whether claims are a foreseeable result of the employment relationship. *Lichon*, 327 Mich App at 393-94. The Court of Appeals' analysis is flawed for two reasons. First, that test has no basis in Michigan law. Second, even if foreseeability is the threshold for arbitrability, the allegations in Lichon's and Smits's complaints were foreseeable because they are prohibited—and therefore governed by—the MDRPA, the Manual, and ELCRA.

[7] For instance, MCL 600.5071 authorizes parties to an action for divorce, annulment, separate maintenance, or child support, custody, or parenting time to agree to binding arbitration. In fact, parties may arbitrate those issues even if one of the parties "is subject to a personal protection order involving domestic violence or if, in the pending domestic relations matter, there are allegations of domestic violence or child abuse." MCL 600.5072(2).

To begin with, there is no authority in Michigan for the proposition that employment-related (or any other, for that matter) claims are subject to arbitration only if they are foreseeable. Rather, the standard for determining the arbitrability of a dispute is well established: arbitration is a matter of contract and the courts apply the same legal principles that govern contract interpretation. *Altobelli*, 499 Mich at 295. Courts determine whether the subject matter of a dispute is of the type that parties intended to submit to arbitration based on the plain language of the agreement. *Id*. at 299. And they should resolve all conflicts in favor of arbitration. *Fromm*, 264 Mich App at 306.

For the reasons discussed above, the MDRPA encompasses each of Lichon's and Smits's claims against Morse and MJMPC. And to the extent there were a legitimate dispute about the arbitrability of the claims at issue, the Court of Appeals should have done what the circuit courts did: resolve all doubts in favor of arbitration. *Id*.

Second, even if the Court were to endorse the Court of Appeals' new foreseeability test (which it should not), the MDRPA and Manual thoroughly document the Firm's policies on: discrimination, harassment, retaliation, state employment laws (like ELCRA), sexual harassment, unwanted physical touching, conduct that interferes with the work environment, an offensive work environment, violence, threats of violence, gender discrimination, and other harassment that could take place at MJMPC, at work-related functions, or outside the office. The MDRPA and Manual include these taboos for the very reason that they are (unfortunately) foreseeable in the workplace. Indeed, arbitration agreements and employment manuals would not exist if these topics were workplace fictions.

The consequences of the Court of Appeals judgment are clear. Creative plaintiffs will now seek to avoid every arbitration agreement by arguing that the claims at issue were not

foreseeable. A clever pleader could plausibly argue that nearly all bad acts are not contemplated at the time of contracting and thereby leave even the most comprehensive arbitration agreements without teeth.

5. The Court of Appeals created a novel "sufficient nexus" test

In another part of its opinion, the Court of Appeals imparted a "sufficient nexus" test in analyzing whether conduct falls within the scope of an arbitration agreement. *Lichon*, 327 Mich App at 393-94. Applying that test here, the Court of Appeals opined that "Lichon's and Smits's claims of sexual assault are unrelated to their employment as, respectively, a receptionist and paralegal." *Id*. at 393 According to the Court of Appeals, "[t]he fact that the sexual assaults would not have occurred but for Lichon's and Smits'[s] employment with the Morse firm does not provide a sufficient nexus between the terms of the MDRPA and the sexual assaults allegedly perpetrated by Morse." *Id*.

Like the Court of Appeals' foreseeability test, the "sufficient nexus" test has no basis in Michigan law, and the Court of Appeals offered no support for it.[8] If consideration of the level of nexus required to bring claims within the scope an arbitration agreement is the new standard for arbitrability, the validity of every existing arbitration agreement in Michigan is now in doubt. This cannot and should not be the law.

[8] The word "nexus" appears in the Court of Appeals citation to *Club Mediterranee, SA v Fitzpatrick*, 162 So3d 251, 252-53 (Fla App, 2015). That case does not apply; it involved allegations by an employee that her employer assaulted her in her dormitory "away from her place of work." Moreover, the Florida District Court of Appeals explicitly recognized that the arbitration agreement in that case was "narrow in scope" and that the "factual allegations of the complaint . . . do not rely in any respect on the employment agreement between [the employee] and her employer." *Id*. By contrast, the MDRPA and Manual in these cases are broad and Lichon's and Smits's complaints are replete with allegations that Morse acted within the scope of his employment.

6. The Court of Appeals obliterated corporate formalities and improperly pierced the corporate veil

In creating a new category of non-arbitrable claims, the Court of Appeals trampled corporate formalities by holding that there is no legal distinction between Morse and MJMPC:

> Essentially, ***Morse and the Morse firm are the same: Morse is the Morse firm and he is solely legally responsible for the actions, or inaction, of the Morse firm***. ***Any recovery plaintiffs obtain, from a jury or from an arbitrator, comes out of the same pocket***. Under these circumstances, plaintiffs' claims against the Morse firm and Morse individually are so intertwined, that it makes them impossible to separate. In reality, a claim of failure to discipline a fellow employee of the firm for offensive and egregious sexual misconduct and/or sexual harassment in these cases is essentially a claim that Morse failed to discipline himself for committing sexual assault and harassment in the workplace. For these reasons, ***it is impossible to separate plaintiffs' claims against defendants***.

Lichon, 327 Mich App at 396-97 (emphasis added). This holding is untenable for two reasons.

First, it ignores the distinction between an individual and corporate entity, which distinction courts have honored for decades. See, e.g., *Seasword v Hilti, Inc*, 449 Mich 542, 547-48; 537 NW2d 221 (1995) (absent some abuse of corporate form, courts honor the distinction between a corporation and its owners). "This presumption, often referred to as a 'corporate veil,' may be pierced only where an otherwise separate corporate existence has been used to 'subvert justice or cause a result that [is] contrary to some other clearly overriding public policy.'" *Id*., quoting *Wells v Firestone*, 421 Mich 641, 650; 364 NW2d 670 (1984). Courts will honor this presumption even when a single individual owns and operates the entity. *Bourne v Muskegon Circuit Judge*, 327 Mich 175, 191; 41 NW2d 515 (1950).

A plaintiff seeking to pierce the corporate veil must prove: (1) control by the owner to such a degree that the corporation has become its mere instrumentality; (2) fraud or wrong by the owner through its corporation; and (3) unjust loss or injury to the plaintiff. *Gledhill v Fisher & Co*, 272 Mich 353, 357-58; 262 NW 371 (1935). See also *Green v Ziegelman*, 310 Mich App

436, 454; 873 NW2d 794 (2015). "But to justify treating the sole stockholder or holding company as responsible it is not enough that the subsidiary is so organized and controlled as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders. It must further appear that to recognize their separate entities would aid in the consummation of a wrong." *Gledhill*, 272 Mich App at 358.

Here, neither Lichon nor Smits pled any allegations seeking to pierce MJMPC's corporate veil. Their omissions alone should have precluded the Court of Appeals from nullifying the distinction between Morse and the Firm. Even assuming Lichon or Smits had sought to pierce the corporate veil, those claims would require a fact-intensive inquiry and the development of a complete record to disregard the corporate form. *Dundee Cement Co v Schupbach Bros, Inc*, 94 Mich App 277, 279–80; 288 NW2d 379 (1979) (holding that, without a full scale trial on the merits and the opportunity to hear witnesses and cross-examination, "there is not an adequate record upon which this Court could base a decision for piercing the corporate veil"). Of course, the Court of Appeals conducted no such trial, heard no such witnesses, and allowed no such cross-examination. Nor could it. It therefore wrongly held that Morse and the Firm were the same.

Second, the Court of Appeals conflated the concepts of liability and damages. The Court of Appeals held that because Morse is the sole shareholder, "these cases [are] essentially a claim that Morse failed to discipline himself . . . ." *Lichon*, 327 Mich App at 397. The Court of Appeals reasoned that "Morse and the Morse firm are the same: Morse is the Morse firm and he is solely legally responsible for the actions, or inaction, of the Morse firm. Any recovery plaintiffs obtain, from a jury or from an arbitrator, comes out of the same pocket." *Id*. at 396.

The issues of whether Morse failed to discipline himself or whether MJMPC failed to discipline Morse are legally distinct from which party is responsible for damages. That Morse is the sole shareholder of MJMPC is of no legal consequence to whether the Court of Appeals could unilaterally pierce the corporate veil to rule that both parties are responsible for damages because they are one and the same. It is plausible that the trier of fact could find that neither Morse nor MJMPC is liable for Plaintiffs' allegations. Or it could find that one or the other is liable—in which case only that particular Defendant would be responsible for damages. Yet under the Court of Appeals' analysis, corporate forms no longer matter and sole shareholders throughout the state are now "the same pocket" as their corporations. This cannot be.

7. The Court of Appeals injected uncertainty into a settled area of law

The Court of Appeals judgment in this case clouds an otherwise developed area of the law. By holding that parties cannot agree to arbitrate sexual assault claims, the Court of Appeals stripped not just Morse and the Firm of their contractual rights, but curtailed the rights of countless parties to arbitrations agreements throughout the State. It also cast doubt on the arbitrability of other claims and raises questions that will increase litigation of arbitration agreements and bog down dockets with disputes that were supposed to be resolved outside the judicial system in the first instance.

Among those questions that will torment courts and parties to arbitration agreements if the Court of Appeals judgment remains good law are:

- May a plaintiff now allege sexual assault and void an otherwise valid and enforceable arbitration agreement so that a court may override the parties' chosen dispute resolution forum, even if the sexual assault claim is never proven?

- If sexual assault is not arbitrable based on public policy, does that mean that other claims by members of certain classes are not arbitrable based on public policy too, including claims for discrimination or harassment based on age, race, religion, national origin, or disability?

- If claims based on unwanted physical conduct are not arbitrable, may parties agree to arbitrate disputes involving unwanted verbal or nonverbal conduct, or digital communications (including texts, emails, or social media)?

- Is *Rembert* still good law? *Rembert* held that an ELCRA employment discrimination claim—like the ones pled by Lichon and Smits—is arbitrable, but the Court of Appeals did not once cite it in its opinion. Can a future Court of Appeals panel avoid application of MCR 7.215(C)(2) and MCR 7.215(J)(1) and ignore the holding of a published opinion based on its preferred public policy?

- If sexual assault is unrelated to employment, can an employer now defend an ELCRA claim by arguing that sexual assault in the workplace is not barred by the statute?

- Are there other categories of claims that "no individual should be forced to arbitrate," *Lichon*, 327 Mich App at 394-95, such that a court may override parties' freedom to contract?

- Are contractual limitations periods for civil assault or workplace discrimination claims still enforceable?

Until now, the law was settled and these questions had been answered. The legal standards governing arbitrability—and how those standards should be applied to the next 1,000 cases—were not in dispute. But the Court of Appeals turned those rules and the law's predictability on their head by carving out a new policy-based exception to the broad array of arbitrable claims. This Court should undo that error and restore certainty to arbitration law.

D. The Court of Appeals Erroneously Thwarted the Parties' Bargained-For Limitations Period

The Court should reverse the Court of Appeals judgment in *Smits I* and *Smits II* for yet another independent reason: the Court of Appeals improperly created a new rule that assault claims cannot be "related to" employment and therefore the parties' bargained-for contractual limitations period does not apply to Smits's claims.

Smits executed the MDRPA and acknowledged receipt of her rights and obligations in the Manual. The Manual includes a six-month limitations period in which Smits could have filed claims like those she filed here:

> I agree that any claim or lawsuit relating to my employment with Michael J. Morse, P.C. must be filed no more than six (6) months after the date of employment action that is the subject of the claim or lawsuit unless a shorter period is provided by law. I waive any statute of limitations to the contrary.

(Smits Employee Policy Manual Acknowledgment Form, Appx 34a.) Smits voluntarily resigned from MJMPC on February 11, 2016, but did not file her complaint in *Smits I* until May 30, 2017—more than 15 months later.[9]

The Court of Appeals held that Smits's claims are unrelated to her employment. *Lichon*, 327 Mich App at 400. On this basis, it reasoned that the Manual's limitations period does not apply to Smits's claims and therefore her claims are timely. *Id.* The Court of Appeals was again incorrect and its decision casts doubt on the validity of existing arbitration agreements with agreed-upon limitations periods.

[9] Defendants also moved for summary disposition of *Smits I* under MCR 2.116(C)(7) on the alternative ground that the limitations period barred her claims. The circuit court did not address this issue because it ruled that her claims should be dismissed and compelled to arbitration under the MDRPA. All the same, the Court of Appeals addressed the issue and this Court may properly do the same. See *Peterman v State Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994) ("[P]laintiffs should not be punished for the omission of the trial court . . . [P]laintiffs raised the issue below and pursued it on appeal. Thus, the issue is appropriately before this Court."). See also *Outdoor Sys, Inc v City of Clawson*, 262 Mich App 716, 720 n 4; 686 NW2d 815 (2004) ("Defendant did argue below that this was a reason it was entitled to summary disposition and continues to advance that argument in support of the trial court's decision. Because the issue was presented below and the record on appeal is sufficient for us to decide it, we can consider it."). This Court can also affirm the circuit court's decision if it reached the right result, although for a different reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

1. The Manual's limitations period applies to Smits's claims

For the reasons detailed at length above, Smits's complaint—and each of the specific counts in it—is replete with allegations that her claims stem from her employment. Each of the counts she alleged is based on her claims of workplace harassment, violations of state law (ELCRA), and related common law torts. (See *Smits I* Compl, Appx 96a-115a.) And each of these claims falls within the scope of the MDRPA and conduct governed by the Manual, which prohibits the complained-of sexual harassment. (See generally Manual, Appx 52a-53a.) Thus, the Manual's limitations period applies to Smits's claims.

2. The limitations period is enforceable like any other contractual provision

"[A]n unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy. A mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions." *Rory v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005).

The Court of Appeals has on numerous occasions upheld limitations periods like the one here. In *Hicks*, the plaintiff filed ELCRA sexual harassment claims against her employer. The employer moved to dismiss under MCR 2.116(C)(7) based on an arbitration agreement. *Hicks*, 267 Mich App at 80. The Court of Appeals affirmed the circuit court's entry of summary disposition in favor of the employer and enforced the arbitration agreement, which included a one-year limitations period for the filing of sexual harassment claims. *Id*. at 89-91. Similarly, in *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234; 625 NW2d 101 (2001), the plaintiff filed an ELCRA age discrimination complaint against her employer. The employer moved to dismiss under MCR 2.116(C)(7) based on the six-month limitations period in the parties' employment agreement. *Id*. at 236. The Court of Appeals affirmed the circuit court's entry of summary disposition in favor of the employer and held that the six-month limitations period was

reasonable and enforceable. *Id*. at 242-44. And in *Clark v DaimlerChrysler Corp*, 268 Mich App 138; 706 NW2d 471 (2005), the plaintiff filed an ELCRA wrongful termination claim against his employer. His employer moved to dismiss under MCR 2.116(C)(7) based on the six-month limitations period in the plaintiff's employment application. *Id*. at 140-41. The Court of Appeals affirmed the circuit court's entry of summary disposition in favor of the employer and held that the six-month limitations period was reasonable and enforceable. *Id*. at 143-45.

This case is much like these authorities. In *Smits I* and *Smits II*, the Court of Appeals should have considered longstanding law, analyzed and applied the plain language of the Manual and its limitations period, and affirmed the circuit court's order dismissing Smits's untimely complaint. Its departure from these principles is another reversible error.

VI. CONCLUSION

For these reasons, Defendants request that the Court enter an order reversing the Court of Appeals judgment and reinstating each of the circuit courts' orders granting Defendant's motions for summary disposition of Plaintiffs' complaints, and granting Defendants such other relief as the Court deems just and proper.

Respectfully submitted,

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Dated: December 12, 2019

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2019, I electronically filed the foregoing using the TrueFiling System which will send notification of this filing to all registered counsel of record.

Date: December 12, 2019

Respectfully submitted,

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